No. 15135

United States
Court of Appeals
for the Ninth Circuit

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Appellant,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska; JOHN McKINNEY, as Director of Finance of the Territory of Alaska; DON M. DAFOE as Commissioner of Education of Alaska and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Appellees.

Transcript of Record

Appeal from the District Court for the District of Alaska, Division Number One.

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.—7-13-56

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

ATTORNEYS OF RECORD

For Plaintiff-Appellant:

HOWARD D. STABLER,
P. O. Box 546, Juneau, Alaska;

HENRY C. CLAUSEN,
315 Montgomery St., San Francisco.

For Defendant-Appellees:

J. GERALD WILLIAMS,
Attorney General;

EDWARD A. MERDES,
Assistant Attorney General,
P. O. Box 2170, Juneau, Alaska.

United States District Court for the District of Alaska, Division Number One, at Juneau

No. 7397-A

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated, Plaintiff,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska, JOHN McKINNEY as Director of Finance of the Territory of Alaska, DON M. DAFOE as Commissioner of Education of Alaska, and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Defendants.

COMPLAINT

1. This action is in equity to restrain an unlawful and unconstitutional expenditure of public funds and arising also under the First, Fifth and Fourteenth Amendments to the United States Constitution and Sections 1981, 1982, and 1983 of Title 42 of the United States Code, to redress the deprivations under color of territorial law, of a right secured by the Constitution of the United States and made applicable to the Territory of Alaska by Section 23 of Title 48 of the United States Code, all

of which more fully appears hereinafter. The taxpayer plaintiff of the Territory of Alaska sues to restrain certain territorial officials from disposing of funds appropriated by the Territorial Legislature for the transportation of children to parochial and church schools. The jurisdiction of this Court is invoked also under Section 101 of Title 48 and Section 1343 of Title 28 of the United States Code.

2. At all times mentioned herein, plaintiff has been and is the owner of real and personal property located in the Juneau-Douglas Independent School District and in the Territory of Alaska, and a citizen and resident and taxpayer thereof; and assessed for and liable to pay taxes to the Territory of Alaska as provided by law; and within one year before the commencement of this action has paid a Territorial Income Tax, a resident fisherman's license tax, an automobile license tax, a $7.50 school tax and a hunting license tax to said territory.

3. [The citizen, resident taxpayers of said Territory number many thousands. Plaintiff and all of said persons are in the same class and are affected by all the matters and things mentioned hereinafter and are subject to like injury and damage as the injuries complained of in plaintiff's complaint.] There are common questions of law and of fact affecting their rights and a common relief is sought. These persons united in interest with plaintiff are too numerous to make it practical to bring them before the Court, and plaintiff, therefore, brings this action on his own behalf as such owner, resi-

dent, citizen and taxpayer, and also in behalf of each and all the said citizens and residents and taxpayers of said school district and Territory.

4. The Legislature of the Territory of Alaska, by Chapter 39 of the Session Laws of Alaska of 1955 (Regular Session), enacted a purported statute providing for the transportation of children attending certain non-public schools in said Territory, which said purported statute reads as follows:

"An Act to promote the public health, safety, and welfare by providing transportation for children attending schools in compliance with compulsory education laws.

"Be It Enacted by the Legislature of the Territory of Alaska:

"Section 1. The Legislature recognizes these facts:

"(a) Attendance at schools for all children between the ages of seven and sixteen years is compulsory, except in those cases where a child, residing more than two miles from his school, is not furnished with transportation.

"(b) The health of all children is endangered by requiring them to walk long distances to school in inclement weather; and their safety, also, is endangered in requiring them to so walk to their schools along highways that have no sidewalks.

"Therefore, in order to protect the health and safety of all school children in Alaska, and to achieve the objectives of the compulsory education laws of Alaska, this statute is enacted.

"Section 2. In those places in Alaska where transportation is provided under Section 37-2-8 ACLA 1949 for children attending public schools, transportation shall likewise be provided for children who, in compliance with the compulsory education laws of Alaska, attend non-public schools which are administered in compliance with Sections 37-11-1, 37-11-2 and 37-11-3 ACLA 1949, where such children, in order to reach such non-public schools, must travel distances comparable with, and over routes the same as, the distances and routes over which the children attending public schools are transported.

"Section 3. This Act shall be administered by the Commissioner of Education under the direction and supervision of the Territorial Board of Education, and the total cost of all such transportation shall be paid from funds appropriated for that purpose by the Legislature."

5. The Legislature of said Territory, by Chapter 6 of the Session Laws of Alaska of 1955 (Extraordinary Session) enacted a general appropriation bill appropriating out of monies in the General Fund of said Territory the sum of $1,250,000.00 for "transportation to schools," part of which sum of $1,250,000.00 was, and is by said Legislature in-

tended to be made available during the school biennium beginning July 1, 1955, and ending June 30, 1957, for the transportation to non-public schools of pupils coming within the provisions of the aforesaid Chapter 39 SLA 1955.

6. [The funds so appropriated from said General Fund for transportation to schools are obtained in part from the regular and special taxes paid and required to be paid to said Territory by plaintiff and other taxpayers similarly situated as aforesaid.]

7. Defendant Don M. Dafoe is the Commissioner of Education of the Territory of Alaska, and as such is charged by the aforesaid Chapter 39 SLA 1955 with the administration of the transportation program provided for therein. Defendants A. H. Ziegler, William Whitehead, Mrs. James March, Mrs. Myra Rank and Robert F. Baldwin are members of the Board of Education of said Territory and as such are charged by the aforesaid Chapter 39 SLA 1955 with directing and supervising the said Commissioner of Education in his administration of said transportation program. Defendant Hugh Wade is the Treasurer of the Territory of Alaska and as such is charged, as provided by law, with the disbursement of monies in the General Fund of said Territory upon warrants drawn by the Director of Finance of said Territory. Defendant John McKinney is the Director of Finance of said Territory and as such is charged, as provided by law, with drawing warrants for any just and

true and legal charge against said Territory and for which an appropriation has been made by the Legislature of said Territory.

8. Under and by virtue of said Chapter 39 SLA 1955 and the appropriation for "transportation to schools" contained in said Chapter 6 SLA 1955, the aforesaid defendants, and their agents, servants, officers and employees will, unless enjoined and restrained by an order of this Court, pay out and expend from the Territorial Treasury of said Territory during the school biennium commencing July 1, 1955, and ending June 30, 1957, a substantial portion of said $1,250,000.00 for the transportation of pupils to non-public schools, including sectarian and denominational schools; and such sums will thereby be lost from the public funds of the territory and from the possession of said Hugh Wade as Treasurer thereof; and the payment of said funds for said purpose will greatly increase the taxes which this plaintiff and the other taxpayers of said Territory are obliged to pay to maintain the Government thereof.

9. The aforesaid Chapter 39 SLA 1955 and Chapter 6 SLA 1955 were and are ultra vires, null and void, and in excess of the power and jurisdiction of the Legislature of the Territory of Alaska to do, pass, enact, provide for, or adopt, and said expenditures are for an unconstitutional purpose, in this and in each of the following respects:

(a) Said purported legislation contravenes the limitations of the Organic Act of said territory, to

wit, Section 77 of Title 48 of the United States Code, which provides, in part, as follows:

> "* * * nor shall any public money be appropriated by the territory or any municipal corporation therein for the support or benefit of any sectarian, denominational or private school, or any school not under the exclusive control of the Government * * *"

in that said legislation appropriates public money for the transportation of pupils to sectarian and denominational schools, thereby facilitating attendance at such schools, saving such schools the expense of themselves providing transportation for pupils, and releasing for other school purposes funds which would otherwise be employed by the schools for such transportation; and said legislation thereby materially supports and substantially benefits such schools.

(b) Said purported legislation and expenditures violate the First, Fifth, and Fourteenth Amendments to the Constitution of the United States and the Civil Rights Act (Sections 1981, 1982, and 1983 of Title 48 of the United States Code) all made applicable to said Territory by Section 23 of Title 48 of the United States Code, in that said legislation appropriates public monies for and provides for the transportation of pupils to sectarian and denominational schools conducted not merely for educational purposes but also for the purpose of indoctrinating children in the particular dogma of

the religious sect which conducts the schools. Said legislation thereby grants preferences to and aids and supports sectarian and denominational education and constitutes a law respecting an establishment of religion. Said legislation also thereby compels plaintiff and other taxpayers similarly situated to be taxed for the support and aid and assistance of, and indirectly to contribute money for the propagation of sectarian and denominational dogma and which they disbelieve, and therefore deprives plaintiff and said other taxpayers of their property without due process of law by compelling them to pay taxes for and to contribute money for an unconstitutional purpose, to wit, the support and aid and assistance of a religious establishment.

(c) Said legislation violates the Fourteenth Amendment to the United States Constitution and the said Civil Rights Act, made applicable to said territory as aforesaid, and contravenes the limitations of the Organic Act of said Territory, to wit, Section 77 of Title 48 of the United States Code, in that there is denied to plaintiff and the other taxpayers similarly situated the equal protection of the laws, and it is class legislation, and it is not uniform in operation, to wit, in that defendants will necessarily enforce said legislation by reason of its wording in a grossly disproportionate manner so as to constitute a deliberate and intentional discrimination against plaintiff and said other taxpayers by expending public money thereunder for the transportation of children to the schools of one particular

sect of which plaintiff is not a member, which sect will, by comparison with the benefits received by other non-public schools, receive a grossly disproportionate benefit therefrom in terms of both the pupils and schools accommodated.

9. Plaintiff has no plain, speedy or adequate remedy at law to prevent such unlawful and unauthorized expenditures.

10. Said intention and acts of defendants to enforce and implement said legislation by paying out public money for the transportation of pupils to sectarian and denominational schools will injure and take from plaintiff and the other taxpayers of said territory their said property and property rights, and will cause him and them material and irreparable loss.

Wherefore, plaintiff prays for judgment as follows, to wit:

1. That the said Chapter 39 SLA 1955, and so much of the said Chapter 6 SLA 1955 as appropriates public money for the transportation of pupils to non-public schools as aforesaid be declared null, void and of no force and effect.

2. That the defendants and their agents, servants, officers and employees be enjoined and restrained from carrying into effect the aforesaid statutory provisions and from paying out of the territorial treasury or otherwise expending any money appropriated or to be appropriated by the Legislature of said territory for the transportation

of pupils to non-public schools, and from contracting for the transportation of any pupils to non-public schools, and from contracting for the transportation of any pupils to non-public schools at Territorial expense.

3. For costs of suit and general relief.

/s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff.

[Endorsed]: Filed November 3, 1955.

[Title of District Court and Cause.]

SUMMONS

To the above-named defendants:

You are hereby summoned and required to serve upon Howard D. Stabler of plaintiff's attorneys, whose address is P.O. Box 546, Shattuck Building, Juneau, Alaska, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of servicee. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[Seal] /s/ J. W. LEIVERS,
Clerk of Court.

Dated November 3, 1955.

Returns on service of summons attached.

[Endorsed]: Filed November 9, 1955.

[Title of District Court and Cause.]

NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT

Notice of Motion

To: Howard D. Stabler, Attorney for plaintiff, Box 546, Juneau, Alaska.

Please take notice that the undersigned will move this Court at 2:00 p.m. on Friday, November 25, 1955, or on the first regular motion day thereafter, in the District Court, Federal Building, Ketchikan, Alaska, for an Order dismissing the complaint on the grounds set forth in the defendants' motion.

Dated at Juneau, Alaska, this 18th day of November, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ EDWARD A. MERDES,
Assistant Attorney General,
Attorney for Defendants.

Motion

The defendants, all appearing specially, move this Court for an order dismissing the complaint herein on the grounds that (1) it fails to state a claim against the defendants upon which relief can be granted and (2) it does not allege that the plaintiff will suffer any injury that will not be suffered in common by the general public.

Dated at Juneau, Alaska, this 18th day of November, 1955.

J. GERALD WILLIAMS,
Attorney General;

By /s/ EDWARD A. MERDES,
Assistant Attorney General,
Attorney for Defendants.

Service of copy acknowledged.

[Endorsed]: Filed November 18, 1955.

[Title of District Court and Cause.]

MINUTE ORDER
TUESDAY, DECEMBER 20, 1955

This case came before the Court for hearing arguments on defendants' Motion to Dismiss. H. D. Stabler appeared in behalf of plaintiff; Edward Merdes, Assistant U. S. Attorney General appeared for defendants. The court advised counsel that the time limit applicable to arguments on motion day would not be imposed. Mr. Merdes presented his argument which Mr. Stabler answered and thereafter Mr. Merdes closed. Counsel filed their briefs and the Court took the matter under advisement. Defendant allowed two Weeks to file Reply Brief.

[Title of District Court and Cause.]

OPINION

Filed: March 26th, 1956.

Henry C. Clausen, San Francisco, California, and Howard D. Stabler, Juneau, Alaska, for Plaintiff.

J. Gerald Williams, Attorney General, and Edward A. Merdes, Assistant Attorney General, for Defendants.

Hodge, District Judge.

Plaintiff in this action as a resident taxpayer of Alaska seeks to enjoin the Treasurer, Director of Finance, Commissioner of Education and members of the Board of Education of the Territory of Alaska from an alleged illegal expenditure of public funds and from carrying into effect the provisions of Chap. 39, SLA 1955, being an act entitled

> "An Act to promote the public health, safety, and welfare by providing transportation for children attending schools in compliance with compulsory education laws";

and the provisions of Chap. 6, SLA 1955, Extraordinary Session, appropriating money from the General Fund of said Territory for "transportation to schools," or such part thereof as appropriates public money for transportation of pupils to non-public or sectarian schools.

The Act in question provides that in those places in Alaska where transportation is provided under existing laws for children attending public schools, transportation shall likewise be provided for children who, in compliance with the compulsory education laws of Alaska, attend non-public schools,

> "where such children, in order to reach such non-public schools, must travel distances comparable with and over routes the same as the distances and routes over which the children attending public schools are transported."

Plaintiff attacks the validity of such legislation upon three grounds: (1) That such legislation contravenes the limitations of the Organic Act of Alaska, 48 U.S.C.A. Sec. 77, which prohibits the appropriation of any public money "for the support or benefit of any sectarian, denominational, or private school, or any school not under the exclusive control of the Government"; (2) That said legislation violates the First, Fifth and Fourteenth Amendments to the Constitution of the United States and the Civil Rights Act, 42 U.S.C.A. 1981-83, in that it aids and supports sectarian and denominational education and constitutes a law respecting an establishment of religion, and therefore deprives plaintiff and other taxpayers of their property without due process of law: (3) It violates the Fourteenth Amendment of the Constitution and the Organic Act in that it denies to plaintiff and other taxpayers similarly situated the equal protection of law and is class legislation.

Defendants have moved for an order dismissing the complaint upon the grounds that (1) It fails to state a claim against the defendants upon which relief can be granted; and (2) It does not allege that plaintiff will suffer any injury that will not be suffered in common by the general public. The controlling question before the Court is whether or not the action presents a justiciable controversy and whether there is sufficient showing as to the plaintiff's right to maintain this action.

The following allegations of the complaint must be noticed as pertinent to this issue:

> "The citizen, resident taxpayers of said Territory, number many thousands. Plaintiff and all of said persons are in the same class and are affected by all the matters and things mentioned hereinafter and are subject to like injury and damage as the injuries complained of in plaintiff's complaint.
>
> "The funds so appropriated from said General Fund for transportation to schools are obtained in part from the regular and special taxes paid and required to be paid to said Territory by plaintiff and other taxpayers similarly situated as aforesaid."
>
> (Under and by virtue of said Acts the defendants) "will, unless enjoined and restrained by an order of this Court, pay out and expend from the Territorial Treasury * * * during the school biennium * * * a substantial portion of

> said $1,250,000.00 for the transportation of pupils to non-public schools, including sectarian and denominational schools; and such sums will thereby be lost from the public funds of the Territory * * *; and the payment of said funds for said purpose will greatly increase the taxes which this plaintiff and the other taxpayers of said Territory are obliged to pay to maintain the Government thereof."

The rule is well settled that with respect to a taxpayer of the United States he cannot maintain an action to enjoin public officials from carrying out Acts of Congress upon the grounds of invalidity of the Act except where there is some direct injury suffered or threatened, presenting a justiciable issue; and he must show not only that the statute is invalid, but that he has sustained or is in immediate danger of sustaining some direct injury as a result of its enforcement, and not merely that he suffers in some indefinite way in common with the general public. Massachusetts vs. Mellon (Frothingham vs. Mellon), 262 U.S. 447; Alabama Power Co. vs. Ickes, 302 U.S. 464, 478; Perkins vs. Lukens Steel Co., 310 U.S. 113, 125; Elliott vs. White, 23 F. 2d 997 (in which the same issue of "promotion of religious views and establishment of religious and sectarian institutions" is involved); Duke Power Co. vs. Greenwood County, 91 F. 2d 665, 676; Wheless vs. Mellon, 10 F. 2d 893, 894-5; Railway Express Agency vs. Kennedy, 189 F. 2d 801, 804.

An injury in a legal sense which may justify such an action is defined as follows:

> "The principle (that one who is threatened with direct and special injury may maintain such action) is without application unless the right invaded is a legal right—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." Tennessee Power Co. vs. T.V.A., 306 U.S. 118, 137; Fallbrook Public Util. Dist. vs. District Court, (C.C.A. 9), 202 F. 2d 942.

This rule has been applied in Federal courts to a suit by a taxpayer to declare acts of state legislatures invalid as in conflict with the Federal or State constitution. Williams vs. Riley, 280 U.S. 78; Columbus & Greenville Ry. Co. vs. Miller, 283 U.S. 96, 99; Doremus vs. Board of Education, 342 U.S. 429, 434 (expressly holding that what the Court said of a Federal statute in the Massachusetts vs. Mellon case is "equally true when a state Act is assailed."

The rule is otherwise as to a taxpayer's suit against a municipality or county, as to which it is universally held that a taxpayer may maintain a suit in equity to restrain a city or county from unlawful expenditure of public funds, which distinction is recognized in Massachusetts vs. Mellon upon the principle that the interest of a taxpayer of a municipality in the application of its moneys

is direct and immediate, and by reason of the peculiar relation of the corporate taxpayer to the municipal corporation. Crampton vs. Zabriskie, 101 U.S. 601; Valentine vs. Robertson and City of Juneau, 300 F. 521.

The application of such rule in the State courts is a matter upon which such courts are divided, and plaintiff concedes that the majority rule upholds the right of a taxpayer to bring such an action, such decisions resting largely on the same grounds as to municipal or county funds. 52 Am. Jur., Taxpayers' Actions, Sec. 6, p. 4; Anno. 58 A.L.R. 589.

The majority rule of the state courts has been followed by the Supreme Court of the Territory of Hawaii and with respect to the Government of Puerto Rico. Lucas vs. American Hawaiian E & C Co., 16 Hawaii 80 (following the rule as to local or municipal legislation of Crampton vs. Zabriskie); Castle vs. Secretary of Hawaii, 16 Hawaii 769; Castle vs. Kapena, 5 Hawaii 27; Ruscaglia vs. District Court of San Juan (C.C.A. 1), 145 F. 2d 274.

With apparent due consideration to these conflicting views, the rule of Massachusetts vs. Mellon has now been definitely applied in this jurisdiction. Sheldon vs. Griffin (C.C.A. 9), 174 F. 2d 382; Shelton vs. Wade (D.C. 1st Div.), 130 F. Supp. 212. (See also Demmert vs. Smith, 82 F. 2d 950, where the question was previously considered by the Circuit Court of Appeals, but left undecided as not necessary to decision in such case.)

In the Sheldon vs. Griffin case, in which a resident taxpayer sought to declare invalid the provisions of the Unemployment Compensation Code of Alaska, the opinion of the Court states as follows:

> "There is nothing in the pleading or proof to indicate that the plaintiff has a particular right of his own to which injury is threatened, or any interest distinguishable from that of the general public in the administration of the law. To entitle himself to be heard he is obliged to demonstrate not only that the statute he attacks is void but that he suffers or is in imminent danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some remote or indefinite way in common with the generality of people." (Citing Frothingham vs. Mellon and other cases.)

In the Shelton vs. Wade case Judge Folta discussed the matter of the majority and minority views of the State courts and the Federal rule, in an action by a taxpayer to enjoin a transfer of public funds from the General Fund of the Territory to the Unemployment Compensation Fund, and concludes upon the express decision of Sheldon vs. Griffin that:

> "Since the plaintiff has not shown that he will suffer any injury that will not be suffered in common by the general public, he has no standing to sue, and hence the decision of the

> Court of Appeals for this Circuit is dispositive of this controversy and requires that the motion for a preliminary injunction be dismissed."

Plaintiff seeks to distinguish Sheldon vs. Griffin from the facts in this case upon the grounds that in the former no public funds were involved; and that the Court found that the statute under attack "adds nothing to the burden of the taxpayers of Alaska." However, the decisions cited by the Circuit Court in support of its ruling, and others supporting the Mellon rule, do not appear to make any distinction in the application of such rule between legislation involving expenditures of public funds and other legislation complained of; and in fact, as recognized by Judge Folta in the Wade case, the rule of Massachusetts vs. Mellon which is adopted by our courts is based instead upon the doctrine of the separation of powers between the legislative and judicial branches of government. (Opinion of Mr. Justice Sutherland, pp. 488-489.)

Plaintiff also contends that Judge Folta in the Wade case failed to distinguish the difference between the taxpayer's status in Sheldon vs. Griffin and the taxpayer's status in the Wade case, who would suffer by illegal expenditures from taxpayer contributed funds; and in effect asks that Sheldon vs. Wade be overruled. But again I fail to find such distinction in the authorities examined, nor that Judge Folta erred in this respect, but on the contrary the learned Judge expressly commented upon

the decision of Judge Dimond in adopting the majority view (78 F. Supp. 466), which was reversed by the Circuit Court. Plaintiff also suggests that the decision of Judge Reed in the case of Wickersham vs. Smith, 7 Alaska 522, should be compared as more logical. However in this opinion, in which the whole subject is reviewed in considerable detail (pp. 528-537) Judge Reed finally concluded that he was unable to pass upon this point.

Hence the contention of plaintiff that Sheldon vs. Griffin is not authority for the decision of Sheldon vs. Wade, and that the rule of the Hawaii and Puerto Rico cases should govern instead in this instance, cannot be sustained.

I am unable to find from the allegations of the complaint that plaintiff has alleged any injury different from that of the general public. In fact, the allegations of the complaint as noted above are quite to the contrary. Nor can I agree that the term "general public" is any different in the legal sense used than "resident taxpayers," which "number many thousands." Therefore the decision of the Circuit Court of Appeals for this Circuit is decisive of this case.

In view of this decision it is unnecessary to pass upon the questions of contravention of the Organic Act or Constitutional prohibitions raised by plaintiff. The motion for dismissal is granted and the case dismissed.

Dated at Nome, Alaska, this 22nd day of March, 1956.

/s/ WALTER H. HODGES,
District Judge.

[Endorsed]: Filed March 26, 1956.

In the United States District Court for the District of Alaska, Division Number One, at Juneau

No. 7397-A

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Plaintiff,

vs.

HUGH WADE as Treasurer of the Territory of Alaska, JOHN McKINNEY as Director of Finance of the Territory of Alaska, DON M. DAFOE as Commissioner of Education of Alaska, and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Defendants.

JUDGMENT AND DECREE

This cause came on to be heard on defendant's Motion to Dismiss, under Rule 12(b), Federal Rules

of Civil Procedure, on the grounds that: (1) It failed to state a claim against the defendants upon which relief can be granted; and (2) It does not allege that the plaintiff will suffer any injury that will not be suffered in common with the general public; and the questions of law raised by the Motion having been argued before the Court on December 20, 1955, by counsel for each party who thereafter filed briefs in support of their arguments; and the Court being fully informed and having on March 26, 1956, erndered and filed herein its written opinion to which reference is made,

It Is Hereby Ordered, Adjudged and Decreed that the Complaint be and it is hereby dismissed for the reasons stated in the Court's opinion of March 26, 1956, and

It Is Further Ordered, Adjudged and Decreed that defendant recover attorney fees in the amount of $250.00.

Dated: April 18, 1956.

/s/ WALTER H. HODGE,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given: That the above-named plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from that certain final judgment and decree, and the whole thereof, dated April 18, 1956, and entered April 23, 1956, in the above-entitled court and cause, ordering, adjudging and decreeing that the plaintiff's complaint be dismissed for the reasons stated in the court's opinion of March 26, 1956; and further ordering, adjudging and decreeing that defendants recover attorney fees in the amount of $250.00.

Dated: Juneau, Alaska, May 8th, 1956.

HENRY C. CLAUSEN,

HOWARD D. STABLER,
Attorneys for Plaintiff-Appellant;

By /s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 9, 1956.

[Title of District Court and Cause.]

SUPERSEDEAS AND COST BOND ON APPEAL

Know All Men by These Presents: That we, Woodrow W. Reynolds, as Principal, and General Casualty Company, a corporation, as Surety, hereby acknowledge ourselves to be indebted and firmly bound to pay to the above-named defendants the sum of Five Hundred Dollars ($500.00), in good lawful money of the United States of America, for the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our heirs, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated the 8th day of May, 1956.

The condition of this obligation is such that whereas the above-bounden plaintiff has appealed to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree of the above-entitled court, in the within-entitled cause, dated April 18, 1956, and entered by the Clerk of said Court on April 23, 1956, wherein and whereby it was ordered, adjudged and decreed that the plaintiff's complaint be dismissed, and that the defendants recover attorney fees in the amount of Two Hundred and Fifty Dollars ($250.00).

Now, therefore, if the said plaintiff shall satisfy said judgment and decree in full, together with said

attorney fee, costs, interest and damages for delay, if for any reason the appeal is dismissed, or if said judgment and decree is affirmed, and to satisfy in full such modification of the judgment and decree and such costs, interest and damages as the appellate court may adjudge and award, then this obligation shall be null and void; otherwise to remain in full force and effect.

/s/ WOODROW W. REYNOLDS,
Principal.

[Seal] GENERAL CASUALTY COMPANY;

By /s/ F. DEWEY BAKER,
Its Attorney in Fact,
Surety.

Taken and acknowledged before me the 8th day of May, 1956.

[Seal] /s/ HOWARD D. STABLER,
Notary Public for Alaska.

My commission expires October 8, 1957.

Receipt of copy acknowledged.

[Endorsed]: Filed May 9, 1956.

In the District Court for the District of Alaska,
First Judicial Division

No. 7397-A

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Plaintiff,

vs.

HUGH WADE, et al.,

Defendants.

OPINION

Filed April 23, 1956.

Henry C. Clausen, San Francisco, California, and Howard D. Stabler, Juneau, Alaska, for Plaintiff.

J. Gerald Williams, Attorney General, Edward A. Merdes and Henry J. Camerot, Assistants Attorney General, for Defendants.

Hodge, District Judge.

Under date of March 22, 1956, this Court rendered an opinion in the above-entitled cause ordering that the motion of the defendants for dismissal be granted. The parties have each submitted form of judgment, one of which provides for the recovery of attorney fees in favor of the defendants and the other of which does not. The Court of its own motion requested that briefs be submitted upon the question of whether or not attorney fees are prop-

erly allowable as costs to be prevailing parties where such parties are officers of the Territory, and represented by the Attorney General, a salaried officer of said Territory.

Rule 54 (d) F.R.C.P. provides that

> "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

It is held that under this Rule the recoverable costs are limited to ordinary taxable costs, and do not include the allowance of attorney fees, although resort may be had to express statutory authority under state laws. Cohen vs. Beneficial Industrial Loan Co., 7 F.R.D. 352, 356; Gold Dust Corporation vs. Hoffenberg, 87 F. 2d 451; Kramer vs. Jarvis, 86 F. Supp. 743.

It is universally held that attorney fees in actions generally are not recoverable as costs except when specifically allowed by statute. Resort must then be had to the language of the Alaska statute, Sec. 55-11-51, A.C.L.A. 1949, as follows:

> "The measure and mode of compensation of attorneys shall be left to the agreement, expressed or implied, of the parties; but there may be allowed to the prevailing party in the judgment certain sums by way of indemnity for his attorney fees in maintaining the action

or defense thereto, which allowances are termed costs." (Underscoring added).

The allowance of such fees is in the discretion of the Court and, as Judge Dimond has indicated, the allowance of attorney fees to the prevailing party under this statute is customarily made in the courts of Alaska. Columbia Lumber Co., Inc., vs. Agostino, 184 F. 2d 731, 736; United States vs. Breeden, 14 Alaska 214, 110 F. Supp. 713. The precise question here is whether under our statute there is anything to indemnify. The Attorney General contends that the Territory should be allowed indemnity for the public expense in defending such an action. Counsel for the plaintiff asks

> "Who is the party to be indemnified? Certainly not the Territory of Alaska which is not a party; certainly not the defendants who have not incurred any expense in the action; and certainly not the salaried Attorney General."

No express decision upon this interesting point is cited in the briefs, nor am I able to find such upon exhaustive research. The Attorney General argues that the right of the Territory to collect such attorney fees if granted by the Court, notwithstanding counsel for the Territory are salaried officers, appears heretofore to have been presumed or conceded in most instances, citing decisions from the First Division in which such fees have been allowed as costs, but not indicating whether this question was raised in such cases. Hence these de-

cisions are not controlling and it appears that the dearth of decisions upon the question is largely attributable to the fact that statutes of this character are rare.

That a state is authorized to collect attorney fees as costs is held in the State of Missouri vs. State of Illinois, 202 U.S. 598, in which the Supreme Court stated that (page 600)

> "There is no reason why the plaintiff should not suffer the usual consequences of failure to establish its case."

In the case of Solomon vs. Welch (D.C. Cal.) 28 F. Supp. 823, it is held that a defendant officer of the United States is entitled to recover

> "all such costs as would be allowed to any other prevailing party,"

although there is no reference in such decision to allowance of attorney fees. An attorney's docket fee under the provisions of Title 28, Sec. 1923, U.S.C.A., has been allowed in the Federal courts to be taxed as costs in favor of the United States, in the discretion of the Court, in United States vs. Bowden (CCA 10) 182 F. 2d 251, and United States vs. Murphy (D.C. Ala.) 59 F. 2d 734.

The right of the United States to recover costs is considered and allowed in a number of decisions. See Moore's Federal Practice, Vol. 6, pp. 1339, 1340; Barron and Holtzoff, Fed. Prac. & Proc., Vol. 3, p. 29. Attorney fees, if allowed under our statute,

are of course deemed a part of such taxable costs. Pilgrim vs. Grant, 9 Alaska 417; Forno vs. Coyle (CCA 9) 75 F. 2d 692.

Upon the authority of these decisions, and in the absence of any statute or decision to the contrary, it must be concluded that the Territory, like the United States, is entitled to the same consideration with respect to allowance of attorney fees as costs as any other litigant. No distinction appears where the action is prosecuted or defended by Territorial officers in their official capacities. Solomon vs. Welch, supra. In this connection the true test appears to be the nature of the suit or the relief demanded, which in this instance is actually against the Territory, represented by its officers. 86 C.J.S., Territories, 646, Sec. 38. There is no question but that under the provisions of Sec. 9-1-8, A.C.L.A. 1949, the Attorney General is empowered, and it is his duty, to represent public officers in such action. Reiter vs. Wallgren, 184 Pac. 2d 571; State ex rel Dunbar vs. State Board, 249 Pac. 996, 999. Hence, in answer to plaintiff's specific question, it is the Territory of Alaska which may be indemnified and not the defendants individually or the Attorney General. Such attorney fees may therefore be allowed in the discretion of the Court.

Touching upon the matter of discretion, plaintiff contends that it is the paramount duty of the Attorney General, for the protection of the interests of the people of the State, where he is cognizant of violations of the Constitution or the statutes by a

Territorial officer, to obstruct and not to assist such officer in carrying out any illegal acts, and hence that the Attorney General should have instituted this action in the first instance, to test the validity of the statute in question, citing Sec. 9-1-8, A.C.L.A., 1949, and Reiter vs. Wallgren and State ex rel Dunbar vs. State Board, supra.

The statute referred to provides

> "Whenever the constitutionality or validity of any statute is seriously in doubt, and the enforcement of such statute affects the Territory or a considerable portion of its people or important industries therein, suits or actions may by the Attorney General be instituted in the name of the Territory in any court to determine the constitutionality or validity of such law."

This statute clearly leaves the matter of instituting suits and actions whenever the constitutionality or validity of any statute is seriously in doubt to the discretion of the Attorney General. It is not the province of the courts to interfere with discretion thus vested in the Executive Branch of the Government, unless such action is shown to be arbitrary or capricious. No demand appears to have been made upon the Attorney General to prosecute such action, which otherwise might change the picture. Instead, the office of the Attorney General was called upon to defend the action in the public interest, for which reason the usual or customary practice should prevail.

The amount of fee to be allowed depends upon the nature and extent of the services rendered. This case did not go to trial but was disposed of upon motion to dismiss upon Rule 12 (b), F.R.C.P., but did require considerable time and labor on the part of the Assistants Attorney General in briefing the question for determination by the Court. Under these circumstances I feel that a fee of $250.00 is reasonable to be allowed to the defendants in this action.

Judgment submitted by the Attorney General is entered accordingly.

Dated at Nome, Alaska, this 18th day of April, 1956.

/s/ WALTER H. HODGE,
District Judge.

[Endorsed]: Filed April 23, 1956.

[Title of District Court and Cause.]

STATEMENT BY APPELLANT OF POINTS TO BE RELIED ON AND DESIGNATION OF RECORD FOR PRINTING

Appellant above named states that the points on which he intends to rely on appeal in this action are as follows:

1. The Court erred in dismissing the complaint herein.

2. The Court erred in ordering that defendants recover attorneys' fees in the amount of $250.00, or in any amount.

3. The Court erred in entering judgment for defendants, dismissing the complaint and ordering that defendants recover attorneys' fees.

4. The Court erred in finding and concluding that the complaint does not allege that the plaintiff will suffer an injury that will not be suffered in common by the general public.

5. The Court erred in finding and concluding that a plaintiff who alleges that he is a taxpayer of the Territory of Alaska and that territorial officials are about to make an unlawful expenditure of territorial funds alleges no injury different from that of the general public, and makes no sufficient showing as to his right to maintain the action, and suffers no direct or special injury entitling him to sue.

6. The Court erred in not finding that plaintiff alleged a direct and special injury entitling him to sue, and alleged an injury different from that of the general public, and made a sufficient showing as to his right to maintain the action.

7. The Court erred in finding and concluding that the action presents no justiciable controversy.

8. The Court erred in concluding that it is the law of the Ninth Circuit that a plaintiff who alleges he is a territorial taxpayer and that territorial

funds are about to be unlawfully expended makes no showing sufficient to allow him to sue in equity to restrain such an unlawful expenditure of territorial funds.

9. The Court erred in not applying the rule of the First Circuit and the courts of Hawaii that a territorial taxpayer may sue to enjoin an unlawful expenditure of territorial funds.

10. The Court erred in concluding that it was unnecessary to pass upon the question of contravention of the Organic Act or Constitutional prohibitions raised by plaintiff.

11. The Court erred in not finding that plaintiff had alleged a claim for relief on the grounds that an unlawful expenditure of territorial funds is involved.

Appellant hereby designates for printing the entire certified transcript of the record as filed with the Clerk of the Court of Appeals.

Dated: May 9, 1956.

HENRY C. CLAUSEN,

HOWARD D. STABLER,

By /s/ HOWARD D. STABLER,
Attorneys for Appellant.

Service of copy acknowledged.

[Endorsed]: Filed May 9, 1956.

[Title of District Court and Cause.]

STIPULATION RE PRINTING TRANSCRIPT OF RECORD

It is stipulated by and between the attorneys for the respective parties herein: that in printing the record in this case for use in the United States Court of Appeals for the Ninth Circuit all captions should be omitted after the title of the action has been once printed, and the name of the paper or document should be substituted therefor. All other parts of the record should be printed.

Dated: Juneau, Alaska, May 9th, 1956.

/s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff-Appellant,

/s/ EDWARD A. MERDES,
Asst. Attorney General of the Territory of Alaska, of Attorney for Defendants-Appellees.

[Endorsed]: Filed May 9, 1956.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and all the Orders of the Court filed in the above-entitled cause,

and constitute the record on appeal as designated by the Appellant.

In witness whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 21st day of May, 1956.

[Seal] /s/ J. W. LEIVERS,
Clerk of District Court.

[Endorsed]: No. 15135. United States Court of Appeals for the Ninth Circuit. Woodrow W. Reynolds, on Behalf of Himself and All Other Taxpayers Similarly Situated, Appellant, vs. Hugh Wade, as Treasurer of the Territory of Alaska, John McKinney, as Director of Finance of the Territory of Alaska, Don M. Dafoe, as Commissioner of Education of Alaska and A. H. Ziegler, William Whitehead, Mrs. James March, Mrs. Myra Rank and Robert F. Baldwin, as Members of the Board of Education of the Territory of Alaska, Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed May 24, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Case No. 15135

WOODROW W. REYNOLDS, on Behalf of Himself and All Other Taxpayers Similarly Situated,

Plaintiff-Appellant,

vs.

HUGH WADE, as Treasurer of the Territory of Alaska; JOHN McKINNEY as Director of Finance of the Territory of Alaska; DON M. DAFOE as Commissioner of Education of Alaska and A. H. ZIEGLER, WILLIAM WHITEHEAD, MRS. JAMES MARCH, MRS. MYRA RANK and ROBERT F. BALDWIN as Members of the Board of Education of the Territory of Alaska,

Defendants-Appellees.

DESIGNATION OF RECORD ON APPEAL AND STATEMENT OF POINTS

Agreeably to the provisions of Rule 17 (6) of the Rules of the above-entitled appellate court, the plaintiff-appellant hereby adopts and designates as his Designation of Record on Appeal and Statement of Points his "Statement by Appellant of Points to Be Relied on and Designation of Record for

Printing" filed in the above-entitled appellate court with the record on appeal.

Dated: Juneau, Alaska, May 31, 1956.

/s/ HOWARD D. STABLER,
Of Attorneys for Plaintiff-Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 4, 1956.